

82-1610

No. _____

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

The Miami Conservancy District,

Petitioner,

v.

Clifford Alexander, Jr., Secretary U.S. Army;
Lt. General J. W. Morris, Chief of Engineers, U.S. Army;
Major General Louis W. Prep, Jr., Corps of Engineers,
Col. Thomas P. Nack, Corps of Engineers,

Respondents,

The Dayton Power and Light Co.;
Board of Commissioners of Montgomery County;
City of Moraine; City of West Carrollton;
City of Dayton; City of Piqua

Intervenors.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ROBERT N. FARQUHAR*
ARTHUR A. AMES
1300 Talbott Tower
Dayton, Ohio 45402
(513) 223-1201
Counsel for Petitioner
* Counsel of Record

March, 1983

Questions Presented

1. Whether, contrary to the provisions of Rule 52 (A) of the Federal Rules of Civil Procedure and the requirements of this Court as set forth in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 53 L ed. 2d 851, 97 S. Ct. 2766 (1977) the Court of Appeals for the Sixth Circuit may substitute its view of the evidence and testimony for that of the District Court without finding that the District Court's findings of fact were "clearly erroneous."
2. Whether the Court of Appeals for the Sixth Circuit should have gone beyond the prior decisions of this Court to find a portion of the Great Miami River to be navigable and thus subject to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 when it is uncontested and agreed that the river is not now navigable and could not be made navigable with any reasonable expenditure of money and that the purposes of said Act could in no way be served.
3. Whether the Court of Appeals for the Sixth Circuit should have adopted a new test of navigability, not consistent with previous decisions of this Court, in order to engraft a bureaucracy upon a system which is already adequately served by a local political subdivision.

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The Miami Conservancy District,

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Lt. General J. W. Morris, Chief of Engineers, U.S. Army;
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Intervenors.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, the Miami Conservancy District, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 692 F 2d 447. A copy is attached as Appendix A. In its opinion the Court of Appeals affirmed in part and reversed in part a decision of the United States District Court for the Southern District of Ohio, Western Division. The opinion of the District Court is officially reported at 507 Fed. Supp. 924. A copy is attached as Appendix B. The January 11, 1983 order of the Court of Appeals treating a suggestion for rehearing en banc as a petition for rehearing, and denying rehearing and rehearing en banc appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1982. The order of the Court of Appeals denying rehearing and rehearing en banc on the basis of a timely suggestion for rehearing en banc was entered on January 11, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant section of the Rivers and Harbors Act of 1899 is Section 10, 33 U.S.C. § 403, is attached as Appendix D.

STATEMENT OF THE CASE

The petitioner is a political subdivision of the State of Ohio. It was created in 1915 shortly after the passage of the Conservancy District Act, Ohio Revised Code Chapter 6101. The Conservancy District Act was passed by the Ohio Legislature after the devastating 1913 flood which took the lives of three hundred citizens of Dayton and the Miami Valley and destroyed one hundred million dollars worth of property. The creation of the Miami Conservancy District was necessitated by the fact that there was no governmental unit in existence which could construct and maintain the flood control facilities necessary to prevent the occurrence of such a disasterous flood. The U.S. Army Corps of Engineers had refused help because it determined that navigation on the streams of the Great Miami River Basin was nonexistent and the Corps' functions, at that time, did not include flood control but was limited to protecting navigation.

With the establishment of the Miami Conservancy District the finest flood control system in the world was constructed, funded solely with private and local money. No financial aid was forthcoming from the federal government nor has any been utilized in the sixty-eight years since the establishment of the District.

On May 31, 1979 the Division Engineer of the Ohio River Division of the U.S. Army Corps of Engineers, in a letter to Petitioner, advised of the Corps' determination that the Great Miami River and its tributaries (Loramie Creek, Stillwater River, Greenville Creek, and Mad River) are navigable waters of the United States, and that the Corps was exercising its jurisdiction over those waters pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The Corps' determination of navigability was based upon historical use of the waters.

Petitioner then filed this action pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 1331 for a declaratory judgment that the streams within the Great Miami River Basin in Ohio are not navigable waters of the United States within the meaning of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 and requested an injunction to restrain the Respondents, their agents, successors, deputies, servants and employees and all persons acting by, through or under them, or by or through their order, from issuing a public notice to exercise jurisdiction over said waters, pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

This case does not involve the issue of the present navigability of the streams within the Great Miami River Basin. All parties have conceded that the streams are not now navigable and that they cannot, through reasonable efforts and expenditures, ever be made navigable. It is without question that the streams have not been navigable since 1830. The issue tried was whether the streams were navigable before 1830. A determination of such historical navigability would allow the imposition of the legal fiction of "indelible navigability", i.e. once a stream is navigable it is always navigable. If this fiction is valid, the Corps may exercise its jurisdiction under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. This exercise of jurisdiction means, essentially, that no work may be performed in the streams without first securing a permit from the Corps of Engineers. The Petitioner also controls work within the streams which might affect the flood control system of the Petitioner. The two permit system provides for duplication of effort and redundancy of expenditures.

A. The Trial Court Proceedings. The District Court, after a two day evidentiary hearing and briefs, found

"... that the Great Miami River, Loramie Creek, Stillwater River, Greenville Creek and Mad River are not now nor have they ever been navigable streams within the meaning of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403."

B. The Court of Appeals Proceedings. Upon appeal by the Respondents, the Court of Appeals reversed the District Court in part and found "... that the Great Miami River was navigable as a matter of law from its mouth to Mile 117." The Court of Appeals affirmed the District Court's finding of non-navigability of the Great Miami River from Mile 117 to Mile 153.5 and of Loramie Creek, Stillwater River, Greenville Creek and Mad River. In its decision the Court of Appeals essentially elected to reject the testimony and evidence relied upon by the District Court and believe the testimony and evidence rejected by the District Court as not being credible.

REASONS FOR GRANTING THE WRIT

The effect of the decision of the Court of Appeals is to engraft upon the permitting process in the Great Miami River Basin an additional bureaucratic level of review. The legal justification for this is to protect the "navigable capacity" of the streams of the Great Miami River Basin as required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The fact that all parties agree that the streams presently have no "navigable capacity" and that even with a reasonable expenditure they cannot be made navigable is apparently of no concern to the Corps or to the Appellate Court.

The Court of Appeals, in reviewing the record, found evidence of the navigability of the Great Miami River from its mouth to Mile 117. All of the evidence related to usage prior to 1830, primarily upon some 1802 records. On the basis of its finding and the theory that legally once a stream is navigable it is always navigable regardless of present usage, the Court, in effect, granted jurisdiction to the Corps of Engineers to protect the "navigable capacity" of the Great Miami River up to Mile 117 as required by 33 U.S.C. § 403. The protection of the "navigable capacity" of an admittedly non-navigable stream is a needless hindrance of the flood control activities of the Petitioner.

I. THE COURT OF APPEALS, IN SUBSTITUTING ITS VIEW OF THE EVIDENCE FOR THAT OF THE DISTRICT COURT WITHOUT FINDING THAT THE DISTRICT COURT'S FINDINGS WERE "CLEARLY ERRONEOUS", VIOLATED THE PROVISIONS OF RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND PRIOR DECISIONS OF THIS COURT.

The Court of Appeals, in its decision below, essentially reviewed the evidence presented to the trial court *de novo* and elected to believe certain testimony rejected by the trial court as not being credible and further elected to ignore other testimony upon which the trial court based its findings of fact and conclusions of law. In doing this, the Court of Appeals did not hold the findings of the trial court to be "clearly erroneous" and did not find that "the reviewing court on the entire evidence is left with a

definite and firm conviction that a mistake has been committed." Such are the requirements of Rule 52 (a), Fed. Rules of Civ. Proc. and of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L ed. 746, 765, 68 S. Ct. 525 (1948). The Court of Appeals did what it was chastised by the Supreme Court for doing in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417, 418, 53 L ed. 2nd 851, 862, 97 S. Ct. 2766 (1977). In that case the Supreme Court outlined the obligations of a Court of Appeals reviewing the findings of a trial court and held, at pages 417 and 418:

"On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the District Courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52 (a). If it decides that the District Court has misapprehended the law, it may accept that Court's findings of fact but reverse its judgment because of legal errors. Here, however, as we can see the situation, the Court of Appeals did neither."

The Supreme Court went on to observe that the Court of Appeals imposed a different remedy ". . . without in any way upsetting the District Court's findings of fact or reversing its conclusions of law." *Dayton Board of Education Case*, supra. That is essentially what the Court of Appeals did in this case, although, in addition, it elected to believe testimony rejected by the trial court as not being credible and to ignore testimony determined by the trial court to be credible and which, in fact, was the basis for its findings of fact. In doing this the Court of Appeals completely ignored the requirement of Rule 52 (a) Fed. Rules of Civ. Proc. that ". . . due regard shall be

given to the opportunity of the trial court to *judge of the credibility of the witnesses.*" (Emphasis added).

Interestingly, the record itself reveals that the trial judge questioned the credibility of the witness relied upon by the Court of Appeals in its decision. It is somewhat unusual for a trial judge to be so concerned with the credibility of a witness that he mentions it on the record in open court, yet that concern was completely ignored by the Court of Appeals. Nowhere in its opinion does the Court of Appeals indicate that it felt the findings of the District Court were "clearly erroneous." It merely elected to review the matter *de novo*.

To allow the Court of Appeals decision in this case to stand will set a dangerous precedent in that it will undermine the provisions of Rule 52 (a) Fed. Rules of Civ. Proc. and condone the failure of a Court of Appeals to follow the dictates of this Court as expressed in *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 94 L ed. 150, 70 S. Ct. 177 (1949); *Graver Tank and Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275, 93 L ed. 672, 676, 69 S. Ct. 535 (1949); *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 332, 96 L ed. 978, 984, 72 S. Ct. 690 (1952); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123, 23 L ed. 2nd. 129, 148, 89 S. Ct. 1562 (1969) and *Dayton Board of Ed. v. Brinkman*, 443 U.S. 526, 61 L ed. 2nd. 720, 99 S. Ct. 2971 (1979).

II. CONFLICT WITH THE DECISIONS OF THIS COURT

The Court of Appeals, while citing numerous decisions of this Court as to the test for navigability, nevertheless elected to ignore those decisions and, instead, follow the holding in *National Resources Defense Council, Inc. et al. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). As the Court of Appeals observed:

"... The District Court for the District of Columbia held that the Corps of Engineers may not alter the congressional definition of 'waters of the United States' present in the 'Water Act'. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376. As an aside, the court advised the Corps to assert jurisdiction over all navigable streams in the nation or forfeit its jurisdiction. In response to *Callaway* the Corps focused its attention on the Great Miami River and its tributaries."

In doing this, the Court of Appeals erroneously imposed the requirements of the Federal Water Polution Control Act of 1972, 33 U.S.C. §§ 1251-1376 in a case which was brought solely under the provisions of § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The tests in the two cases should be distinguished in that § 10 of the Rivers and Harbors Act of 1899 relates only to "navigable waters of the United States" whereas the Federal Water Pollution Control Act relates to the broader range of "waters of the United States."

The Court of Appeals correctly cited the law of navigability that has been set forth by this Court but then elected not to follow that law.

What is a "navigable water of the United States" has been the subject of numerous decisions in this Court.

It was set forth in *The Daniel Ball v. United States*, 77 U.S. (10 Wall) 557, 563, (1871) where this Court held:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, *in their ordinary condition, as highways of commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (emphasis added).

The Court of Appeals pointed out that ". . . where a commercial use or susceptibility of use is 'sporadic and ineffective,' the river is not navigable." Citing *United States v. State of Oregon*, 295 U.S. 1, 23 (1935). The Court of Appeals also observed that "a waterway is not navigable when 'its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water.'" *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, 699 (1899)."

The Court of Appeals recognized:

"The Supreme Court has emphasized repeatedly that a navigable water of the United States must be 'of practical service as a highway of commerce.' *Economy Light*, 256 U.S. at 124. A navigable river is one of 'general and common usefulness for purposes of trade and commerce.' *Oregon*, 295 U.S. at 23. The Rivers and Harbors Act protects 'the Nation's right that its waterways be utilized for the interests of the commerce of the whole country.' *Appalachian Electric*, 311 U.S. at 405." (page 4 of the opinion).

The Court of Appeals quoted from *Leovy v. United States*, 117 U.S. 621, 633 (1900) with apparent approval when it stated:

"When it is remembered that the source of the power of the general government to act at all in this matter

arises out of its power to regulate commerce with foreign counties and among the states, it is obvious that what the Constitution and acts of Congress have in view is *the promotion and protection of commerce in its inter-national and interstate aspect*, and a practical construction must be put on these enactments as intended for such large and important purposes." (emphasis added by the Court of Appeals).

The law discussed by the Court of Appeals (supra) fits well with the facts as found by the District Court. However the new facts as found by the Court of Appeals are not at all consistent with the law described above. The Court of Appeals and the District Court both recognized the "historical use test" of navigability which, in effect, is that once a river is navigable it is always navigable. It was because of this "historical use test" that the testimony at the trial related to whether the streams of the Great Miami River Basin were navigable before 1830; all parties having agreed that there had been no navigation of those streams since that time.

The Court of Appeals criticized the finding of the District Court that flatboat travel was ". . . at best sporadic, limited to periods of high water, and only on a seasonable basis." The Court of Appeals then went on to establish its own test and found:

"Like many larger rivers in the Mississippi River system, the Great Miami River afforded predictable albeit not always dependable use during spring high water fluctuations." (page 6 of the opinion).

It is difficult to see any distinction between the test, as established by the Court of Appeals and that adopted by the District Court. Nevertheless, it is submitted that neither condition found to be applicable to the Great Miami River

meets the tests established by the United States Supreme Court, in the cases previously cited.

The Court of Appeals finding of navigability of the Great Miami River based upon its ". . . predictable albeit not always dependable use during spring high water fluctuations" is totally at odds with the holding of this Court in *United States v. Rio Grande Dam and Irrigation Company*, *supra*, where the holding is that the water way is not navigable when "its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water." This is precisely what the trial court found in its decision.

III. THE DOCTRINE OF "INDELIBLE NAVIGABILITY" SHOULD BE RE-EXAMINED BY THIS COURT AND APPLIED ONLY IN THOSE CASES WHERE THE PURPOSES OF SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899, 33 U.S.C. SECTION 403 WILL BE REASONABLY SERVED AND REJECTED IN THOSE CASES WHERE THE ONLY RESULT OF ITS APPLICATION IS THE ENGRAFTING OF A LAYER OF BUREAUCRACY UPON A SYSTEM WHICH ALREADY FULLY SERVES THE LEGITIMATE NEEDS OF THE PUBLIC.

The doctrine of "indelible navigability" is also known as the "historical use test." It was first established by the United States Supreme Court in *The Economy Light and Power Company v. The United States*, 256 U.S. 113, 65 L ed. 84741 S.Ct. 409 (1921). A reading of that case and all of the subsequent "historical use test" cases decided

by the United States Supreme Court reveals that the test was invoked because it could be legitimately said that the purposes of Section 10 of the Rivers and Harbors Act of 1899 i.e. protection or promotion of navigation, would be served. In each of the cases the rivers in question had an *abundance of water* but had been rendered non-navigable by natural or artificial obstructions. In each of the cases it was reasonable to assume that, with the expenditure of a reasonable amount of money, the rivers could again be rendered navigable. In this case the parties agree that the Great Miami River and its tributaries are not now navigable and could not be made navigable regardless of how much money might be expended for that purpose. These conclusions were drawn from studies made over the years by the Corps of Engineers itself. Unlike all of the other cases in which the "historical use test" was imposed to find navigability, the structure and composition of the stream bed and the *inadequate water supply* prevents the Great Miami River and its tributaries from ever being made navigable. Unlike all of the other "historical use test" cases before the United States Supreme Court, the result of the Court of Appeals finding of navigability is solely to engraft another layer of bureaucracy upon a permitting process already adequately served by local government. The purposes of the Rivers and Harbors Act of 1899 can in no way be served by the finding that the Great Miami River to Mile 117 is navigable.

IV. THE QUESTIONS RAISED BY THE DECISION BELOW ARE OF EXCEPTIONAL IMPORTANCE.

It seems ludicrous, and certainly flies in the face of the present trend toward deregulation, to establish a new bureaucratic permitting process merely to protect navigation on a river all parties agree is not navigable and cannot be made navigable. The Corps seems to be interpreting its mandate to assume the jurisdiction cited above to mean that it should assert control under Section 10 over any and all waters regardless of navigability thus exceeding its constitutional authority. The trend of the Corps of Engineers to establish its jurisdiction over as many streams of the United States as possible, as mandated by the *Callaway* case, will result in a similar bureaucratic permitting process in many areas of the United States where that needless waste of tax payer's money does not now exist. Consequently, the question in this case is of great national importance and an allowance of this Petition for Certiorari would certainly have nationwide implications. The application of the "historical use test" to find navigability of a stream which is not now navigable and cannot be made navigable with a reasonable expenditure of money far exceeds what the United States Supreme Court has previously done in *Economy Light and Power v. United States, supra*, *United States v. Appalachian Electric Power Company*, 311 U.S. 377, 85 L ed. 243. 61 S.Ct. — (1940) *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Company*, 313 U.S. 508, 85 L ed. 1487 (1941) and the subsequent cases decided by the United States Supreme Court. It is submitted that the United States Supreme Court has never imposed the "historical use test" in a case where there is no "susceptibility of use" for navigation and that to permit it to be done in this case sets a

dangerous and useless precedent at great tax payer's expense for no useful reason.

Further, one of the most basic of all trial court functions is the judging of the credibility of witnesses. If the Sixth Circuit Court of Appeals is permitted to pre-empt one of its trial courts on a fundamental concept like this one, our judicial system may be in danger of serious deterioration. Nothing could be of a more compelling interest to this Court than the maintenance of the integrity of our trial court functions.

CONCLUSION

Petitioner submits that the foregoing establishes the presence of "special and important" reasons for granting this petition. The cases cited above clearly establish that the Court of Appeals for the Sixth Circuit exceeded its authority in reversing the findings of facts by the District Court without finding them to be "clearly erroneous" and ignored the previous decisions of this Court by establishing a new test of navigability in order to find the Great Miami River navigable from its confluence with the Ohio River to Mile 117.

For the reasons set forth in this petition, certiorari should be granted and the case should be set for plenary review by this Court.

Respectfully submitted,

ROBERT N. FARQUHAR*

ARTHUR A. AMES

1300 Talbott Tower

Dayton, Ohio 45402

(513) 223-1201

Counsel for Petitioners

*** Counsel of Record**

March, 1983

APPENDIX A

No. 81-3243

UNITED STATES COURT OF APPEALS For The Sixth Circuit

The Miami Conservancy District,

Plaintiff-Appellee,

v.

Clifford Alexander, Jr., Secretary U.S. Army;
Lt. General J. W. Morris, Chief of Engineers, U.S. Army;
Major General Louis W. Prep, Jr., Corps of Engineers,
Col. Thomas P. Nack, Corps of Engineers,

Defendants-Appellants,

The Dayton Power and Light Co.;
Board of Commissioners of Montgomery County;
City of Moraine; City of West Carrollton;
City of Dayton; City of Piqua

Intervenors.

On Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed November 12, 1982

Action was brought for declaratory judgment concerning navigability of the Great Miami River and its tribu-

ties. The United States District Court for the Southern District of Ohio, Carl B. Rubin, Chief Judge, 507 F.Supp. 924, held that the river and its tributaries were not navigable streams. Appeal was taken. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that portion of Great Miami River constituted navigable waters and were under jurisdiction of the Corps of Engineers; however, portion of river and its tributaries were not navigable and not under jurisdiction of the Corps.

Reversed in part and affirmed in part.

Before: KENNEDY and MARTIN, Circuit Judges; and GUY, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. The Army Corps of Engineers appeals an order of the Southern District of Ohio enjoining it from asserting jurisdiction over the Great Miami River and certain tributaries. Under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, the Corps has jurisdiction over a river only if the river is "navigable." The District Court found that the Great Miami River and its tributaries were not navigable and granted an injunction to the Miami Valley Conservancy District. We affirm in part and reverse in part.

Jurisdiction over the following portions of the Great Miami River system is in controversy: The Great Miami River from Mile 7.5 to Mile 153.5; the Loramie Creek from its mouth to Mile 20.8; the Stillwater River from its mouth to Mile 33.0; the Greenville Creek from its mouth to Mile 23.6; and the Mad River from its mouth to Mile 26.2. Jurisdiction over the Little Miami River and its tributaries is not an issue in this case. The Miami

* Honorable Ralph B. Guy, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

Valley Conservancy District conceded the Corp's jurisdiction over the Great Miami River from its mouth to Mile 7.5.

The Ohio legislature created the Miami Valley Conservancy District in 1914 to control the River's periodic but severe floods. The Conservancy District's duties have been expanded to include the supervision of waste treatment and recreation on the River.

The Corps of Engineers has authority to assert federal jurisdiction over "navigable waters of the United States," under the Rivers and Harbors Act of 1899 and other Acts of Congress. In *National Resources Defense Council, Inc., et al. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), the District Court for the District of Columbia held that the Corps of Engineers may not alter the congressional definition of "waters of the United States" present in the "Water Act." Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376. As an aside, the court advised the Corps to assert jurisdiction over all navigable streams in the nation or forfeit its jurisdiction. In response to *Callaway* the Corps focused its attention on the Great Miami River and its tributaries. In 1979 the Corps determined that the River was navigable as a matter of law and asserted jurisdiction over the River through its power under the Rivers and Harbors Act.

The Conservancy District challenged the Corps' determination of navigability by seeking injunctive relief. The question of navigability turns on whether the river has ever been or is now used as a water highway for interstate commerce. The parties agreed that the navigability of the Great Miami River depends on whether or not it had been used for commerce prior to the construction of the Miami-Erie Canal in 1830. The parties also agreed that all

River traffic was directed to the Canal after its construction. The District Court examined evidence of River use by Indians and fur traders, by military expeditions, and by commercial traders with flatboats and keelboats. In conclusion the court found that the Great Miami River and its tributaries "are not now nor have they ever been navigable streams within the meaning of section 10 of the Rivers and Harbors Act of 1899." Accordingly, the injunction issued.

The earliest and most frequently cited definition of navigability appeared in *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871). The Supreme Court held:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are *used, or are susceptible of being used*, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be conducted in the *customary modes of trade and travel on water*.

(emphasis added).

Subsequent cases have refined the definition of navigability. A river is navigable if it can be made useful through reasonable improvements. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 (1940). The use of navigable streams may be limited to travel during seasonal water level fluctuations. *Economy Light and Power Co. v. United States*, 256 U.S. 113, 122 (1921). Moreover, a river is still navigable despite "occasional natural obstructions or portages. . . ." *Id.* However, where commercial use or susceptibility of use is "sporadic and ineffective," the river is not navigable. *United States v. State of Oregon*, 295 U.S. 1, 28 (1935). A waterway is not navigable when

"its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899).

The Supreme Court has emphasized repeatedly that a navigable waterway of the United States must be "of practical service as a highway of commerce." *Economy Light*, 256 U.S. at 124. A navigable river is one of "general and common usefulness for purposes of trade and commerce." *Oregon*, 295 U.S. at 23. The Rivers and Harbors Act protects "the Nation's right that its waterways be utilized for the interests of the commerce of the whole country." *Appalachian Electric*, 311 U.S. at 405.

When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and acts of Congress have in view is *the promotion and protection of commerce in its international and interstate aspect*, and a practical construction must be put on these enactments as intended for such large and important purposes.

Levoy v. United States, 117 U.S. 621, 633 (1900) (emphasis added).

Under the historical use test of navigability a river is "indelibly navigable." *State of Oklahoma ex rel. Phillips v. Guy F. Atkins*, 313 U.S. 508 (1941). That is, a river is navigable as a matter of law if it has ever been navigable. For a river to be considered a navigable water of the United States, it is sufficient that the river has been used as a commercial highway even though it no longer is or can be used as such.

The test of navigability has been stated and restated by

the federal courts for the last one hundred years. Navigability has been defined in countless ways but its essential elements have remained constant. The District Court here properly identified these elements: A navigable waterway of the United States must (1) be or have been (2) used or susceptible of use (3) in the customary modes of trade and travel on water (4) as a highway for interstate commerce.

The Corps here challenges all the factual and legal conclusions of the District Court. A review of the evidence leads us to agree with the Corps that the District Court erred in holding that the Great Miami River from Mile 7.5 to Mile 117, near Piqua, is not navigable. However, the record clearly supports the District Court's holdings that the tributaries of the River and the River from Mile 117 to Mile 153.5 are not navigable.

The District Court counted sixteen "instances" of flat-boat travel on the Great Miami River from 1800 to 1830. However, the court found that flatboat travel was "at best sporadic, limited to periods of highwater, and only on a seasonal basis." The court also determined that citizens of the area would not have invested money in the Miami-Erie Canal if the River had been navigable by customary modes of trade and travel.

These factual findings do not present an accurate picture of the trial evidence. Official records from the Port of New Orleans report flatboats arriving from the Great Miami River in each year from 1800 to 1830. Fleets containing as many as seventy-nine and one hundred thirty flatboats were sighted on the Great Miami River. Testimony also demonstrated that the high water on the River, necessary for downstream travel, lasted for several months in the spring. The average size of flatboats on the River

was seventy feet long and twenty feet wide with a three-foot draft when fully loaded. Flatboats on the Great Miami River were the same as most flatboats floating downstream to New Orleans by way of the Ohio and the Mississippi Rivers.

Furthermore, the District Court relied heavily on the construction of the Miami-Erie Canal to support its conclusion that the River was not navigable. The court concluded that the citizens of southwestern Ohio would not have built the Canal if the River had been navigable. Unfortunately this conclusion is flawed. Before the Canal was built, traders were forced to rely on the River for transportation. There was abundant evidence that commercial traders used the Canal after its construction because it was a *better* highway for commerce than the River. The fact that people used the Canal rather than the River says only that the River was less navigable than the Canal. It says nothing about the navigability of the River in absolute terms. The existence and use of the Canal after 1830 does not rebut proof of the River's navigability before 1830.

A more complete statement of the evidence produced at trial shows that the elements of navigability are present. Like many larger rivers in the Mississippi River system, the Great Miami River afforded predictable albeit not always dependable use during spring high water fluctuations. Downstream flatboat travel was the customary mode of travel in the early 1800's and the Great Miami River was no exception. Finally, the Great Miami River was used as a commercial highway to float goods from southwestern Ohio to New Orleans. The record establishes inescapably that the Great Miami River was navigable as a matter of law from its mouth to Mile 117.

The Corps has failed to prove that the Great Miami

River from Mile 117 to Mile 153.5 and its tributaries are navigable as a matter of law. Evidence of commercial navigation on the rivers in southwestern Ohio was primarily of a general and non-specific character. The District Court did not err in its factual or legal conclusions that the upper portion of the River and the tributaries were not navigable.

The Corps' determination of navigability of the Greenville Creek and the Great Miami River from Mile 117 to Mile 153.5 rests on early military expeditions. In the late Eighteenth Century military expeditions transported supplies up the rivers to several forts in southwestern Ohio. As many as thirty-two men could have been required to pull a loaded flatboat upstream. Military use of the rivers through great quantities of manpower was not the customary mode of travel for settlers and farmers of the time. The use of the rivers by military expeditions does not prove the susceptibility of use for interstate commerce. The Great Miami River from Mile 117 to Mile 153.5 and the Greenville Creek are not, therefore, navigable waters of the United States.

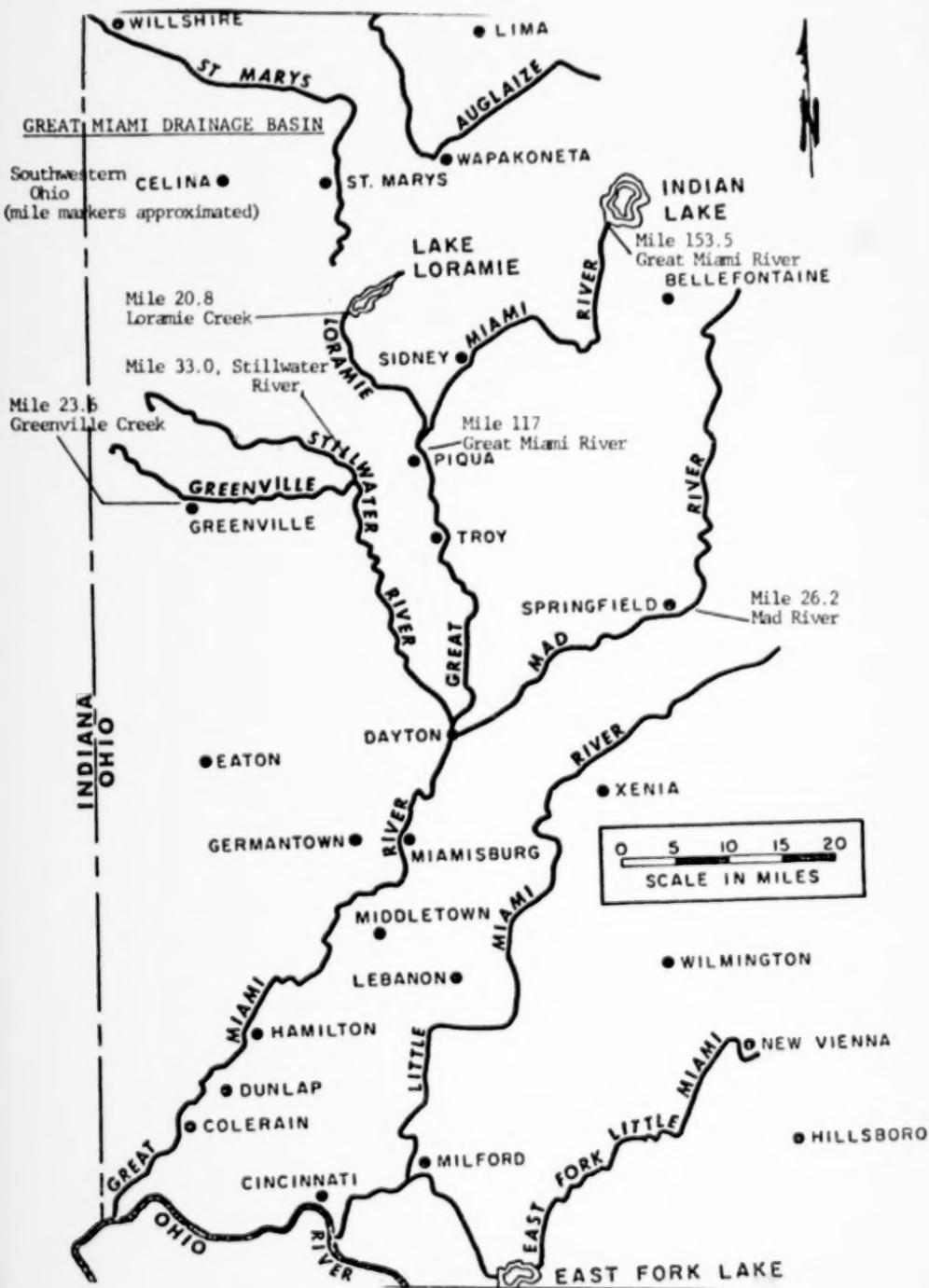
Evidence to support navigability on Loramie Creek consisted of Dr. Johnson's testimony for the Corps. Dr. Johnson testified that two keelboat lines were established on the Great Miami and Maumee Rivers in 1809 and 1819. He produced no specific instances of keelboat use on Loramie Creek nor of the success of the lines. Evidence suggested that these keelboat lines included portages of six, twelve, or one hundred fifty miles. Additionally, Dr. Johnson admitted that keelboat commerce on these rivers was "limited." The District Court concluded from this sparse record that keelboat use was "sporadic," "minimal," and "uniformly unsuccessful." Without specific evidence

of successful commercial navigation on the Loramie Creek, by keelboats or otherwise, we cannot find that the Creek was used as a highway for interstate commerce. The Loramie Creek is not a navigable waterway of the United States.

The Corps demonstrated at trial no specific instances of navigation on the Mad and Stillwater Rivers. The Corps' claim of navigability rests in part on Eighteenth Century Indian and fur trader use of rivers throughout Ohio and the Midwest. For additional support the Corps points to the extensive use of flatboats on the Great Miami River from 1800 to 1830. Without specific evidence of commercial use of the rivers or their susceptibility of use, like the District Court, we decline to hold that the Mad and Stillwater Rivers are navigable as a matter of law.

In summary, we affirm the District Court's judgment that the tributaries of the Great Miami River are not navigable under the Rivers and Harbors Act of 1899. However, we reverse the District Court's determination regarding the River itself. We hold the evidence compels the finding that the Great Miami River from its mouth to Mile 117 was a highway for interstate commerce before 1830. Hence, this portion of the River is a navigable water of the United States. And because this portion of Great Miami River is navigable as a matter of law, the Corps of Engineers may assert jurisdiction over it under the Rivers and Harbors Act of 1899.

Judgment reversed in part and affirmed in part.



APPENDIX B

THE MIAMI VALLEY CONSERVANCY DISTRICT,

Plaintiff,

v.

CLIFFORD L. ALEXANDER et al.,

Defendants.

Civ. No. C-1-79-336.

United States District Court,
S. D. Ohio, W. D.

February 20, 1981

Action was brought for declaratory judgment concerning the navigability of the Great Miami River and its tributaries. The District Court, Carl B. Rubin, Chief Judge, held that the Great Miami River, Loramie Creek, Stillwater River, Greenville Creek and Mad River were not and have never been navigable streams within the meaning of the River and Harbors Act of 1899.

Judgment accordingly.

FINDINGS OF FACT, OPINION, AND CONCLUSIONS OF LAW

CARL B. RUBIN, Chief Judge.

This matter was tried to the Court on December 1 and

2, 1980. Testimony and evidence¹ were received at that time.

This case concerns the efforts of the United States Corps of Engineers to declare that the following are navigable streams within the meaning of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403:

- a. The Great Miami River from its mouth to mile 153.5 S.R. 274 crossing in Logan County;
- b. Loramie Creek from its mouth to mile 20.8 Loramie Portage;
- c. Stillwater River from its mouth to mile 33.0 confluence with Greenville Creek;
- d. Greenville Creek from its mouth to mile 23.6 Daly Road crossing upstream of the City of Greenville;
- e. Mad River from its mouth to mile 26.2 confluence with Buck Creek near Springfield, Ohio.

¹ In addition to the foregoing the Court made certain inquiries of its own. Briefs in the case of *Koehne v. City of Dayton*, 97 Ohio St. 341, 119 N.E. 651 (1917), were obtained from the Clerk of the Supreme Court of Ohio. The *Koehne* case involved a finding by the Supreme Court of Ohio in 1917 that the Great Miami River at Dayton, Ohio was not a navigable stream. In view of the holding in *Economy Light Co. v. United States*, 246 U.S. 113, 65 L.Ed. 847, 41 S.Ct. 409 (1920):

A decision of a state Supreme Court holding a river not navigable in its natural condition does not bind the United States if it was not a party to the suit.

Koehne v. City of Dayton has been disregarded. The briefs contain no information useful in the determination of this matter. They were made available to counsel for examination.

In an effort to fill in gaps in plaintiff's Exhibit 4, which is a series of maps showing the location of the Miami Erie Canal, the Court sought the assistance of the Cincinnati Historical Society. No information was obtained that became any part of the findings of fact herein.

Plaintiff, the Miami Conservancy District, created by the General Assembly of Ohio in 1914, and Intervenors who are municipal corporations located along the Great Miami River and its tributaries have brought an action for declaratory judgment. The sole issue before the Court concerns navigability of the Great Miami River and its tributaries based upon historical use only. It is agreed by the parties that no use of these waterways for commercial purposes occurred after 1830.

In accordance with Rule 52 of the Federal Rules of Civil Procedure the Court does submit its Findings of Fact, Opinion and Conclusions of law.

I. FINDINGS OF FACT

1. *Geography*

The terrain of southwestern Ohio may be described as rolling or hilly. From the Ohio River on the south and for a distance of some 150 miles to the north all rivers flow in a southerly direction and ultimately empty into the Ohio River. Near the center of the state, a divide occurs whereby north thereof the rivers flow northwardly to Lake Erie and south thereof they flow southwardly into the Ohio River. The Great Miami River is located in the western portion of Ohio. It flows southwestwardly following a valley which includes the cities of Hamilton, Middletown, and Dayton. The river passes through extensive gravel deposits which affect the characteristics of the riverbed. North of the City of Dayton the Great Miami River is joined by two of its tributaries; the Mad River, which flows into the Great Miami River from the northeast and the Stillwater River, which flows approximately from the north. Loramie Creek and Greenville Creek,

the other streams involved herein are tributaries of the Stillwater River.

At the Ohio River and for some miles northwardly, the Great Miami River Valley is paralleled on the east by the Millcreek Valley. The Millcreek is a substantially smaller stream and is significant in this matter only because its valley became the situs of the southerly portion of the Miami Erie Canal. The two valleys are separated by a ridge of hills and the two streams do not join at any point.²

2. *Presettlement Use*

While accurate records do not exist, there is an agreement among historians that during the early and middle part of the Eighteenth Century the Miami River Valley and the Maumee River Valley to the north were used to some extent by fur traders from Canada and by the Miami Indians who inhabited the area. There is equal evidence to indicate that an Indian village known as "Pickawillamy" and located near the present City of Piqua was a center of fur trading and probably a collection point. Fur pelts, however, may equally have been brought to Pickawillamy overland by trails leading east and west, as from the Great Miami River and its various tributaries. Other than the fur trade, no evidence of any commercial use of these waters was presented. Commercial use began near the beginning of the Nineteenth Century and the gradual settlement of southwestern Ohio.

² Defendant's Exhibit E-1 seems to indicate that the Millcreek joins the Great Miami River at approximately the Ohio River. While the accuracy of this exhibit has not been questioned, the court takes judicial notice that the Millcreek enters the Ohio River within the corporate limits of the City of Cincinnati, some fifteen miles east of the mouth of the Great Miami River.

3. Military Campaigns

The presence of the Miami Indians inhibited the settlement of this area. Despite pressures for the acquisition of farm land following the Revolutionary War, the subduing of the Indians was necessary before inland settlement could take place.

The military campaigns in the area of Southwestern Ohio covered the period from 1787 when the Northwest Ordinance opened the land for settlement to 1794 when the Battle of Fallen Timbers effectively ended Indian resistance. During the campaigns expeditions had been sent from Cincinnati which proceeded both overland and up the Great Miami River to Dayton and beyond Dayton up the Great Miami River and its tributaries. Evidence was presented to the Court that on a few occasions flatboats were brought upstream with the assistance of military personnel. Such use was accomplished only through the use of large numbers of soldiers. Testimony was presented that in one instance the upstream use of a flatboat required the efforts of thirty-two men. Aside from the occasional use by the military during the period in question under such conditions, no evidence was presented to the Court of any significant use of the river or its tributaries at any time on an upstream basis.

4. Commercial Use, 1800-1830

During the first thirty years of the Nineteenth Century, commercial water transportation was limited to flatboats, keelboats, steamboats and tow boats.

A. Flatboats

Flatboats were essentially rafts with some side boards thereon. They were used to float cargo down the Great

Miami River to the Ohio and then down the Ohio and the Mississippi to New Orleans.. At New Orleans the flatboats were dismantled and sold as lumber. Flatboats were used on one occasion for upstream purposes in the settlement of Dayton. It should be pointed out, however, that while the flatboats transported only thirteen of the settlers, forty-seven others proceeded overland from Cincinnati to Dayton. The flatboat use during the period in question was at best sporadic, limited to periods of high water, and only on a seasonal basis. Only in sixteen of the thirty years between 1800 and 1830 were uses of flatboats noted. In fourteen of the sixteen years the evidence disclosed that the use was limited to the months of April and May.

The use of the river by flatboats varied substantially. In 1825, seventy-nine flatboats were observed by a newspaper. In four years, 1800, 1809, 1811 and 1821, only one flatboat use was noted and in two instances, 1811 and 1821, the one flatboat was lost.

B. *Keelboats*

An advance in design of boats occurred in the construction of keelboats.³ Keelboats tended to be more stable and to draw more water than flatboats. Use of keelboats was apparently even more sporadic than that of flatboats. Evidence presented to the Court indicated that the only use of a keelboat on the Great Miami River occurred in 1821 and that use was unsuccessful. A keelboat company from Dayton to Fort Laramie was in existence in 1818 to 1820 but was unsuccessful in its endeavor. The use of

³ A description of keelboats may be found in *U.S. v. Appalachian Power Co.*, 311 U.S. at 411, 61 S.Ct. at 301 (1940). "Keel boats were flat bottomed bateaux fifty to seventy feet long with a draft of two feet and a carrying capacity varying up to ten or twelve tons."

keelboats on the Great Miami River and its tributaries was minimal and uniformly unsuccessful.

C. Steamboats

The Court will take judicial notice that a steamboat was built and used on the Hudson River by Robert Fulton in 1809 and that the steamboat, Savannah, crossed the Atlantic in 1818. The first steamboat visited Cincinnati in 1811.⁴ In contrast to the foregoing, no steamboat ever used the Great Miami River. Efforts by residents to clear and deepen the channel of the Great Miami River to allow steamboat use were a failure. The Miami Steamboat Company organized approximately in 1824, intended to improve the river and purchase a steamboat, was unable to raise sufficient money by sale of stock to do either (Plaintiff's Exhibit 2, at pp. 8 & 9).

D. Tow Boats

The final method of utilizing rivers for upstream use which was potentially feasible during the period in question involved the use of boats towed upstream by horses or mules. They were used on the Erie Canal connecting Lake Erie to the Hudson River, and became the standard method whereby the Miami-Erie Canal functioned after 1829. No evidence was presented to the Court that at any time was a towpath constructed or even contemplated along the Great Miami River.

From the foregoing the Court finds that no method of commercial transportation during the period 1800 to 1830 was ever effectively utilized for upstream traffic along the

⁴ Wright, Alice, *Romance along the Ohio* (Marietta, Ohio: McDonald Printing Co. 1938), p. 24.

Great Miami River or its tributaries. Only sporadic use during high water occurred for downstream use.

5. *Overland Transportation*

The alternative to water transportation during the period in question was overland transportation, using animals or wagons along the "roads" of the time. They were barely useable, although as previously noted, most of the original settlers of Dayton did travel from Cincinnati in this way. The testimony of defendants' expert witness Joan Fabe is a graphic description of such roads.⁵ For much of the

⁵ "The first roads, be termed roads appear about 1810 in this area. Now their definition of a road was totally different than our definition of a road. The best of them we would think of—I guess you could compare them to a mountain trail that a backpacker would hike through in the Smokey Mountains today. There was no such thing as a road as we know of them. The best were trails with a pathway that you could see. Most of them were more apt to be something that was marked by the blazing of trees. . . .

There was an Indian trail that followed the Great Miami path at this point. Again this was what they called a road. . . .

Between 1810 and 1820 we began to get what they called wagon roads. This was the expressway of the period. Even the wagon roads did not resemble in any way, shape or form the most miserable road that we would see today. These were dirt roads. The trials widened barely enough for a wagon to get though; and I say barely because the branches and limbs of trees would be constantly hitting against the sides of the wagon or coach

In addition to that, when these wagon roads were built they cut down the trees for the road, usually got the logs out of the way, but not all. But they never, ever cut the stumps down. And, of course, this is a very heavily forested area, so the road was full, completely full of stumps; you know, every few feet a stump, and the stumps would be anywhere from one foot to four feet high.

In addition to this, you had enormous potholes in which you would have to get oxen or horses to haul a wagon out. You couldn't pull it, drive it out by yourself. There were no bridges whatsoever, so that

period, overland transportation between Cincinnati and Dayton was not a practical method of commercial transportation. Neither the river nor the roads offered the necessary connection between the two cities.

6. The Miami-Erie Canal

The necessity for safe, dependable and efficient transportation between the Dayton area and the Ohio River compelled the construction of a canal. All witnesses before the Court agreed that without the construction of the Miami-Erie Canal, the development of the area north of Cincinnati would not have occurred.

Effort to construct a canal began in 1822 when the General Assembly of Ohio directed that routes of canals from the Ohio River to Lake Erie be surveyed and a Canal Commission be established. Actual construction of the Miami-Erie Canal began in the area between Middletown and Cincinnati. By 1829 the canal had been constructed to Dayton, Ohio and it was subsequently opened in its complete length from Cincinnati to Lake Erie. The canal was forty feet wide and varied in depth from four feet at Cincinnati to six feet at Lake Erie. Both upstream and downstream traffic moved by the use of horses or mules towing the canal boats from a towpath along the side thereof.

you would have to ford any streams or rivers. The road conditions were so bad that the average life of a wheel was considered to be four miles.

In addition to this, in the early days, again tapering off, but from the 1770's until, easily until 1815 I would say, land travel was extremely hazardous because—not only because of the Indians but because of robbers or what the people at the time called pirates constantly trying to waylay anybody on land. One of the cardinal rules for river transportation was 'Land as seldom as possible,' for the simple reason it was so hazardous that you would get killed and your goods taken away from you."

While the expert witnesses differed as to degree, all agreed that the canal had a profound effect upon the economics of the Great Miami River Valley. It survived the coming of the railroads some twenty years later and remained in use for almost ninety years. By 1920 it was outmoded as a form of commercial transport and in that year it was drained and the land returned to the State of Ohio for other uses.

No evidence was presented of any commercial traffic on the Great Miami River or on the tributaries which are before the Court after the construction of the Miami-Erie Canal.

II.

OPINION

The significance of the foregoing facts must be determined in light of decisions by the Supreme Court of the United States on the question of navigability. An early pronouncement on this issue may be found in *The Daniel Ball* case, 10 Wall 557, 19 L.Ed. 999 (1870). The Supreme Court of the United States held:

those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used *in their ordinary condition* as highways for commerce in which trade and travel are or may be conducted *in the customary modes of trade and travel on water . . .* (emphasis added)

The Daniel Ball, supra at 563.

The critical teaching of *The Daniel Ball* seems to be the "use test" under ordinary conditions.

At least two rivers have subsequently been considered under *The Daniel Ball* test. The DesPlaines River in Illinois was the subject of determination in *Economy Light & Power Co. v. United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1920), and the New River in West Virginia was considered in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940). Defendant the United States urges that this Court determine the Great Miami River to be navigable largely be reliance upon the *Economy* and the *Appalachian Power* cases.

The Court deems *Economy* to be inapplicable in view of a factual determination set forth by the Supreme Court on page 117. That determination is:

Supplies in large quantity and variety needed by the early settlers also were transported over this route between Chicago and St. Louis and other points. Canoes and other boats of various kinds were employed having light draft but capable of carrying several tons each manned by crews of six or eight men. (emphasis added)

In contrast to the DesPlaines River the Great Miami River did not carry supplies in large quantity and variety. Its use at best was sporadic, seasonal and limited to downstream use.

The most recent pronouncement on navigability is found in the *Appalachian* case, *supra*. This case deals with the New River and examines in detail the significance of a phrase in *Daniel Ball* as to susceptibility of use. The Court stated:

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered.

'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway otherwise suitable for navigation is not barred from that classification merely because artificial aides must make the highway suitable for use before commercial navigation may be undertaken . . . The District Court is quite right in saying that there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. *There must be a balance between cost and need at a time when the improvements would be useful.* (emphasis added)

U. S. v. Appalachian Power Co., supra at 407-408. 61 S.Ct. at 298-299.

The Court went on to point out that throughout the New River there was an abundance of water and that the flowage sufficed if other conditions made the New River available for navigation. *Appalachian, supra* at 410, 61 S.Ct. at 300.

The Supreme Court also pointed out that keelboats which were also known as "bateaux" were used for upriver traffic. The specific determination is:

The evidence is clear that these bateaux plied from Hinton up to near Glen Lyn with fair regularity through the first decade of this century and well into the second. . . .

Appalachian, supra at 411, 61 S.Ct. at 301.

The reliance by the United States on the above cited cases appears to be misplaced except insofar as they determine a formula for considering the question of navigability. Unlike the situation in *Daniel Ball*, there was never a steamboat on the Great Miami River. Unlike the

circumstances of *Economy Light & Power*, there were never "supplies in large quantity and variety needed by the early settlers" transported over the Great Miami River. Unlike *Appalachian Electric Power Company*, there was never the up and downstream use with "fair regularity."

Cases which seem to be more pertinent to the fact situation herein are as follows:

While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of 'navigable waters of the United States,' or to define what traffic shall constitute 'commerce among the States,' so as to make such question sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that *it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.* (emphasis added).

Leovy v. United States, 177 U.S. 621 at 632, 20 S.Ct. 797 at 801 (1900).

While the evidence relating to the part of the river in the eastern half of the State is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; — in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. *Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and bene-*

*ficial use in commerce is essential to establish navigability.*¹ (emphasis added)

¹ *United States v. Rio Grande Co.*, 174 U.S. 690, 698-699 [19 S.Ct., 770, 773-774]; *Leovy v. United States*, 177 U.S. 621 [20 S.Ct. 797, 44 L.Ed. 914]; *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, 682; *Harrison v. Fite*, 148 Fed. 781, 784; *North American Dredging Co. v. Mintzer*, 245 Fed. 297, 300.

State of Oklahoma v. State of Texas, 258 U.S. 574 at 591, 42 S.Ct. 406 at 413 (1922).

These conditions preclude the use of navigation of the area in question, in its natural and ordinary condition, according to the customary modes of trade or travel over water, and establish an absence of that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability. See *United States v. Rio Grande Irrigation Co.*, *supra* [174 U.S.] 698 [19 S.Ct. 773]. *At most the evidence shows an occasional use of boats, sporadic and ineffective, as has been observed on lakes, streams or ponds large enough to float a boat, but which nevertheless were held to lack navigable capacity.* (emphasis added)

United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935).

At a time when water transportation was so important that it represented not only the only practical method, but in fact the only possible method, use of the Great Miami River was limited to those years and to those seasons of the year when the river existed in a high water stage.

At a time when keelboats were designed for both upstream and downstream use they were never once used commercially in high or low water to proceed upstream.

At a time when steamboats became practical for upstream

use, there was not one recorded instance of such a use on the Great Miami River.

At a time when the feasibility of constructing a tow path and using horses or mules to pull boats upstream had been demonstrated, there was not one recorded instance of such a use on the Great Miami River. These were the "customary modes of trade and travel on water." Their absence from the Great Miami River is significant.

Finally, at a time when the citizens of southwestern Ohio, desperate for adequate water transportation, were prepared to expend sizable sums of money to create it, they elected to spend not one penny upon improving the Great Miami River itself, but instead constructed an entirely new water way adjoining such river for much of its length. They abandoned forever any notion that the Great Miami River could be used for trade and commerce in any practical manner whatsoever.

If the critical need in the early Nineteenth Century for a dependable, year around, two-way artery of water commerce could be met only by the construction of a canal, then it must follow as a matter of logic that the Great Miami River did not meet this need.

Since no evidence was presented to the Court of any use of the river after 1830 and the opening of the Miami Erie Canal, the Court can only conclude that the river was not and is not used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel were or may be conducted in the customary mode of trade and travel by water.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction to declare rights and legal relations in accordance with 28 U.S.C. § 2201.

B. The navigable waters of the United States are under the exclusive protection of the United States in accordance with 33 U.S.C. § 401 *et seq.*

[1] C. A river is navigable in law when it is navigable in fact. Rivers are navigable in fact when they are used or are susceptible of being used in their ordinary condition for trade and travel in the customary modes of trade and travel. *The Daniel Ball*, 10 Wall 557, 10 L.Ed. 999 (1870).

[2] D. A river is not navigable in fact when its use was sporadic, irregular and confined to downstream use during short periods of temporary high water. *State of Oklahoma v. State of Texas*, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922).

E. The Great Miami River and its tributaries are not navigable in fact since they were never used except as set forth in Conclusion of Law D for the customary modes of travel and trade.

[3] F. Where a canal is constructed parallel to and adjoining a river and the canal is used exclusively at a time when water transportation was the customary mode of trade and travel, such river may be deemed non-navigable and incapable of improvement for navigation within an appropriate balance between cost and need. *See United States v. Appalachian Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940).

[4] G. In accordance with the foregoing the Court does declare that the Great Miami River, Loramie Creek,

Stillwater River, Greenville Creek and Mad River are not now nor have they ever been navigable streams within the meaning of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S. § 403.

IT IS SO ORDERED.

APPENDIX C

No. 81-3243

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

[Filed January 11, 1983]

The Miami Conservancy District,

Plaintiff-Appellee

v.

**Clifford Alexander, Jr., Secretary U.S. Army;
Lt. General J. W. Morris, Chief of Engineers, U.S. Army;
Major General Louis W. Prep, Jr., Corps of Engineers,
Col. Thomas P. Nack, Corps of Engineers,**

Defendants-Appellants

**The Dayton Power and Light Co.;
Board of Commissioners of Montgomery County;
City of Moraine; City of West Carrollton;
City of Dayton; City of Piqua**

Intervenors

ORDER

**Before: KENNEDY and MARTIN, Circuit Judges; and GUY,
District Judge.***

* Honorable Ralph B. Guy, Jr., United States District Judge for the
Eastern District of Michigan, sitting by designation.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX D

33 U.S.C.

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chiefs of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.